

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DYE SEED, INC.,

Plaintiff,

-vs-

FARMLAND MUTUAL INSURANCE  
COMPANY,

Defendant.

NO. CV-12-0218-LRS

ORDER GRANTING PLAINTIFF'S  
MOTION FOR RECONSIDERATION

**BEFORE THE COURT** is Plaintiff's Motion For Reconsideration Of Order Denying Its Motion For Partial Summary Judgment (ECF No. 91) filed on October 21, 2013, and without oral argument. Plaintiff requests the Court reconsider its Order Denying Plaintiff's Motion For Partial Summary Judgment (ECF No. 86) and grant Plaintiff's motion for partial summary judgment. The briefing was completed on December 2, 2013 for this motion.

As a brief background, this Court's prior order entered June 19, 2013 granted Dye Seed's motion for partial summary judgment relating to Farmland's duty to defend. In Dye Seed's motion for partial summary judgment (ECF No. 40) under reconsideration, Dye Seed had requested the Court to determine the following:

1. That Farmland denied its duty to defend in bad faith.
2. That Farmland unreasonably denied coverage to Dye Seed in

1 violation of Washington's Insurance Fair Conduct Act (RCW  
48.30.015).

2 3. That Farmland's unreasonable denial of coverage violated  
Washington's Consumer Protection Act (RCW 19.86).

3 4. That Farmland is estopped from raising any coverage defenses  
based on its bad faith denial of a duty to defend.

4  
5 Plaintiff Dye Seed requests reconsideration of the Court's order  
6 denying Plaintiff's motion for partial summary judgment arguing that the  
7 Court erred in applying a reasonableness standard to Farmland's claim  
8 handling where, under the specific unfair claims practices regulations,  
9 none exists. Further, Plaintiff believes it submitted sufficient  
10 evidence that Farmland's denial was unreasonable as a matter of law and  
11 Farmland submitted no evidence that its conduct was reasonable.

12 Plaintiff contends that because the regulations (which define  
13 specific unfair and deceptive acts) relevant to this case do not contain  
14 a specific "reasonableness" requirement, the reasonableness of the  
15 insurer's conduct is not a defense.

16 **WAC 284-30-330** provides:

17 Specific unfair claims settlement practices defined.  
18 The following are hereby defined as unfair methods of  
19 competition and unfair or deceptive acts or practices in  
the business of insurance, specifically applicable to  
the settlement of claims:

20 (1) Misrepresenting pertinent facts or insurance policy  
provisions.

21 **WAC 284-30-350** defines the specific misrepresentations that are  
22 deemed unfair or deceptive:

23 (1) No insurer shall fail to fully disclose to first  
24 party claimants all pertinent benefits, coverages or  
25 other provisions of an insurance policy or insurance  
contract under which a claim is presented.

26 (2) No agent shall conceal from first party claimants  
benefits, coverages or other provisions of any insurance  
contract when such benefits, coverages or other

1 provisions are pertinent to a claim.

2 Plaintiff asserts that while other unfair and deceptive practices  
3 regulations are subject to a reasonableness standard, the duty to  
4 affirmatively disclose coverages and pertinent policy provisions is not.  
5 Farmland submitted the affidavit of Stuart Shkolnick in which he stated  
6 that he "mistakenly" reviewed a cancelled policy that did not contain the  
7 Seed Merchants Endorsement. The undisputed facts show that prior to  
8 issuing the denial letter, Mr. Shkolnick discussed coverage with both his  
9 claims manager, Catherine Grady, and the claims director, Mike Johnson.  
10 On three levels of review, a decision was made to deny coverage.  
11 Plaintiff concludes that the undisputed facts show that it notified  
12 Farmland of the claim and Farmland denied the claim without advising Dye  
13 Seed about the Seed Merchants Endorsement.

14 Farmland suggests the denial was merely a good faith mistake by the  
15 adjuster handling the claim, which does not amount to bad faith. Farmland  
16 makes no attempt to argue its purported "mistake" was reasonable. Rather,  
17 Farmland argues that in any case involving bad faith, the question of  
18 reasonableness must be left to the jury.

19 Plaintiff argues that only if there were a reasonable disagreement  
20 about Farmland's interpretation of a disclosed provision of the policy,  
21 and Farmland's interpretation was merely wrong, then the reasonableness  
22 of its interpretation may be subject to a finding of fact by the trier  
23 of fact. Plaintiff states that is not what occurred. Plaintiff contends  
24 Farmland's failure to disclose all of the applicable policy provisions  
25 was a per se unfair and deceptive act.

26 Plaintiff further asserts that it presented evidence that, upon

1 first receiving the claim, Farmland determined it was going to deny the  
2 claim. No coverage investigation or claim investigation was conducted.  
3 Shortly thereafter, Farmland communicated its denial decision both orally  
4 and in writing. Plaintiff concludes that under *Fireman's Fund Ins. Co.*  
5 *v. Alaska Pride Pshp.*, 106 F.3d 1465, 1470 (9<sup>th</sup> Cir. 1997), failure to  
6 conduct a reasonable investigation alone is sufficient to support a  
7 finding of bad faith. Plaintiff argues that reasonableness of an  
8 adjuster's investigation and coverage denial is properly determined on  
9 summary judgment if there are no disputed facts as to what the adjuster  
10 did. *Villella v. PEMCO*, 106 Wn.2d 806, 725 P.2d 957 (1986).

11 Plaintiff argues it is undisputed, based on the affidavit of Stuart  
12 Shkolnick, that Mr. Shkolnick reviewed a cancelled policy that did not  
13 contain the Seed Merchants Endorsement. Plaintiff further argues that  
14 even if this was a good faith mistake, it was not a reasonable mistake  
15 based on a reasonable investigation. Mr. Shkolnick knew the loss  
16 implicated other policies, but he failed to review them. Basing a  
17 coverage denial on a policy the adjuster knew was not in effect at the  
18 time of loss is clearly unreasonable.

19 Next Plaintiff asserts that a violation of WAC 284-30-330 is an  
20 unfair or deceptive act and a per se violation of the CPA. *Sharbono v.*  
21 *Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 414, 161 P.3d 406  
22 (2007). Plaintiff states that Farmland has never disputed that its  
23 failure to disclose the Seed Merchants Endorsement was a violation of WAC  
24 284-30-330. Rather, Farmland argued that doing so was reasonable in light  
25 of Mr. Shkolnick's review of the wrong policy. Plaintiff again points  
26 out that a reasonableness inquiry, as discussed above, is not required

1 because there is no reasonableness standard in that particular  
2 regulation.

3 Finally Plaintiff argues that Farmland's bad faith and violation of  
4 the Insurance Fair Conduct Act (RCW 48.30.015) can be determined as a  
5 matter of law under *Lloyd v. Allstate Ins. Co.*, 167 Wn. App. 490, 496,  
6 275 P.3d 323, 326 (2012). In *Lloyd*, the court indicated that where  
7 reasonable minds could not differ as to the reasonableness of the  
8 insured's actions, summary judgment was appropriate. Here, Plaintiff  
9 asserts, Farmland has not shown that the denial was based on adequate  
10 information and that it gave equal consideration to Dye Seed's interests  
11 as its own. More specifically, Farmland knew the 2007 insurance policy  
12 was not in effect at the time of the loss. It also knew later policies  
13 were in effect because it specifically cited to those policies in its  
14 denial letter.

15 Considering the terms of a cancelled policy, without more, cannot  
16 reasonably be said to be based on adequate information. As to giving  
17 equal consideration to Plaintiff's (the insured) interests, Farmland knew  
18 Dye Seed was embroiled in expensive litigation and that Scotts was  
19 claiming over 3 million dollars in damages. By its actions and  
20 inadequate review, Farmland in effect considered only paths for denial  
21 of coverage rather than any policy provisions that may have triggered  
22 coverage. Plaintiff argues that there is no regulatory wording setting  
23 forth a reasonableness standard that applies to the insurer's duty to  
24 affirmatively disclose all pertinent policy provisions. However, assuming  
25 a reasonableness standard applies, basing a denial decision on a canceled  
26 policy and failing to consider the policies that were actually in force,

1 particularly when Farmland affirmatively acknowledged the latter policies  
2 were implicated, cannot be deemed reasonable under any standard.

3 Plaintiff concludes that for the same reasons, Farmland's violation  
4 of the Insurance Fair Conduct Act (RCW 48.30.015) can be determined as  
5 a matter of law. The Act provides a remedy to an insured who is  
6 "unreasonably denied a claim for coverage or payment of benefits." The  
7 statute also specifically states that a violation of WAC's 284-30-330 &  
8 350 is a violation of the statute.

9 Farmland opposes the motion for consideration arguing that whether  
10 Farmland committed any extra-contractual violations depends upon the  
11 reasonableness of Farmland's conduct, and reasonableness, generally, is  
12 an issue of fact. Farmland asserts that the Court was correct in finding  
13 that reasonableness could not be determined on summary judgment and must  
14 be deemed an issue of fact for trial because of the fact-intensive  
15 history of the exchanges between Dye Seed and Farmland during the  
16 presentation of Dye Seed's claims. Under the circumstances of this case,  
17 Farmland states that the Court has the right and the obligation to hear  
18 testimony and weigh the credibility of witnesses to evaluate whether  
19 Farmland put its financial interests ahead of Dye Seed's or committed a  
20 good faith mistake, and to evaluate the overall reasonableness of  
21 Farmland's conduct.

22 Farmland further adds that Plaintiff, through its motion for  
23 reconsideration, has added new facts and legal theory that it could have  
24 asserted in its motion for partial summary judgment. Farmland argues  
25 this "new" legal theory requires the Court to weigh witness credibility  
26 and does not provide sufficient grounds for reconsideration. However,

1 Farmland has been given the opportunity to respond to the allegedly "new"  
2 legal theory and evidence and has done so (see ECF No. 118, 119).  
3 Farmland concludes that the Court's earlier ruling is not in error and  
4 are consistent with Washington law.

5 The Court has carefully considered the motion for reconsideration  
6 and the arguments of the parties. "[T]he major grounds that justify  
7 reconsideration involve an intervening change of controlling law, the  
8 availability of new evidence, or the need to correct a clear error or  
9 prevent manifest injustice." *Pyramid Lake Paiute Tribe v. Hodel*, 882  
10 F.2d 364, 369 n.5 (9th Cir. 1989) (quoting 18 C. Wright, A. Miller & E.  
11 Cooper, *Federal Practice and Procedure* § 4478, at 790); see *Frederick S.*  
12 *Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985); see also  
13 *Keene Corp. v. International Fidelity Ins. Co.*, 561 F. Supp. 656, 665  
14 (N.D. Ill. 1982) (reconsideration available "to correct manifest errors  
15 of law or fact or to present newly discovered evidence"). "Whether or  
16 not to grant reconsideration is committed to the sound discretion of the  
17 court." *Navajo Nation v. Confederated Tribes & Bands of the Yakima*  
18 *Indian Nation*, 331 F.3d 1041, 1046 (9th Cir.2003).

19 Plaintiff does not argue that there has been a change of controlling  
20 law, or that new evidence is available, but expressly argues that the  
21 Court committed error of law or fact and reconsideration is necessary to  
22 prevent a manifest injustice. The Court finds that Plaintiff is correct  
23 and that the Court erred where the undisputed facts indicate the insurer  
24 (through the claims adjuster and his 2 superiors, a claims manager and  
25 a claims director) failed to fully disclose to Plaintiff all pertinent  
26 benefits, coverages or other provisions of the current insurance policy

1 or insurance contract under which its claim was presented.

2 **A. Bad Faith**

3 The Court agrees that the actions of Farmland, in failing to notice  
4 and disclose the Seed Merchant's forms in the 2009-2011 general liability  
5 policies and umbrella policies, were so unreasonably deficient that  
6 reasonable minds could not differ that these actions constitute something  
7 more than a good faith mistake. In *Lloyd v. Allstate Ins. Co.*, 167  
8 Wash.App. 490, 496 (2012), the court stated:

9 An insurer does not act in bad faith where it "acts  
10 honestly, bases its decision on adequate information,  
11 and does not overemphasize its own interest." *Werlinger*  
12 *v. Clarendon Nat'l Ins. Co.*, 129 Wash.App. 804, 808, 120  
13 P.3d 593 (2005), review denied, 157 Wash.2d 1004, 136  
14 P.3d 759 (2006). The determinative question is the  
15 reasonableness of the insurer's actions in light of all  
16 the facts and circumstances of the case. *Anderson v.*  
17 *State Farm Mut. Ins. Co.*, 101 Wash.App. 323, 329-30, 2  
18 P.3d 1029 (2000), review denied, 142 Wash.2d 1017, 20  
19 P.3d 945 (2001). Where reasonable minds could not differ  
20 as to the reasonableness of the insurer's actions,  
21 summary judgment is appropriate. See *Hertog, ex rel.*  
22 *S.A.H. v. City of Seattle*, 138 Wash.2d 265, 275, 979  
23 P.2d 400 (1999).

24 Insurance companies have a statutory duty to deal in good faith with  
25 their insureds. RCW 48.01.030. Bad faith is the failure to exercise  
26 good faith. *American States Ins. Co. v. Symes of Silverdale, Inc.*, 150  
Wn.2d 462, 78P.3d 1266 (2003). An insurer's duty to act in good faith  
is broad and may be breached by conduct short of intentional bad faith  
or fraud, although not by a good faith mistake. *Rizutti v. Basin*  
*Travel Service of Othello, Inc.*, 125 Wn. App. 602, 105 P.3d 1012  
(2005). The insurer is certainly in the best position to know which  
policy is current, applicable and provides coverage.

Additionally, failure to conduct a reasonable investigation alone

1 is sufficient to support a finding of bad faith. *Fireman's Fund ins.*  
2 *Co. v. Alaska Pride Pshp.*, 106 F.3d 1465, 1470 (9<sup>th</sup> Cir. 1997).  
3 Reasonableness of an adjuster's investigation and coverage denial is  
4 properly determined on summary judgment if there are no disputed facts  
5 as to what the adjuster did. *Villella v. PEMCO*, 106 Wn.2d 806, 725  
6 P.2d 957 (1986). Reasonable minds could not differ in finding it so  
7 unreasonably deficient that one adjuster and two superiors could  
8 inadvertently overlook the Seed Merchants Endorsement in reviewing at  
9 least 3 years of policies to formulate Farmland's decision to deny  
10 coverage. Instead, Farmland chose language from a cancelled insurance  
11 policy, rather than the policies that were in force, to deny coverage.  
12 Dye Seed is a seed merchant and the Seed Merchants Endorsement  
13 ultimately triggered coverage.

14 A denial of coverage that is unreasonable, frivolous, or  
15 unfounded constitutes bad faith. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d  
16 558, 560, 951 P.2d 1124 (1998). The test for bad faith denial of  
17 coverage is not whether the insurer's interpretation is correct, but  
18 whether the insurer's conduct was reasonable. *Torina Fine Homes v.*  
19 *Mutual of Enumclaw Ins. Co.*, 118 Wash.App. 12, 21, 74 P.3d 648 (2003),  
20 *rev. denied*, 151 Wash.2d 1010, 89 P.3d 712 (2004). The Court finds  
21 that Farmland's conduct in the denial of coverage was not reasonable  
22 and constitutes bad faith under Washington case law. See *Wright v.*  
23 *Safeco Ins. Co. of America*, 124 Wash.App. 263 (2004).

24 **B. Violation of Washington's Insurance Fair Conduct Act (RCW**  
25 **48.30.015)**

26 Plaintiff argues that Farmland unreasonably denied coverage to  
Dye Seed in violation of Washington's Insurance Fair Conduct Act (RCW

1 48.30.015). The Act provides a remedy to an insured who is  
2 "unreasonably denied a claim for coverage or payment of benefits." The  
3 statute also specifically states that a violation of WAC's 284-30-330  
4 & 350 is a violation of the statute.

5 As discussed above, the Court finds that Farmland unreasonably  
6 denied a claim of coverage or payment of benefits. More specifically,  
7 the undisputed facts support a finding that Farmland failed to fully  
8 disclose to Dye Seed all pertinent benefits, coverages or other  
9 provisions of an insurance policy or insurance contract under which a  
10 claim is presented. Therefore, the Court finds that the statute, RCW  
11 48.30.015, was violated.

12  
13 **C. Violation of the Consumer Protection Act ("CPA") (RCW 19.86)**

14 To prevail on a CPA claim, Dye Seed must show: (1) an unfair or  
15 deceptive act or practice; (2) in trade or commerce; (3) which affects  
16 the public interest; (4) that injured the plaintiff's business or  
17 property; and (5) that the unfair or deceptive act complained of  
18 caused the injury suffered. *Hangman Ridge*, at 784-85. All five  
19 elements must be established. *Id.*

20 An insurer commits a per se violation of the CPA when the insurer  
21 violates a statute that contains a specific legislative declaration of  
22 public interest impact. *Hangman Ridge Training Stables, Inc. v. Safeco*  
23 *Title Ins. Co.*, 105 Wn2d 778, 791, 719 P.2d 531 (1986). RCW 48.01.030  
24 contains such a public interest declaration. A violation of WAC  
25 284-30-330 is an unfair or deceptive act and a per se violation of  
26 the CPA. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App.  
383, 414, (2007). As discussed above, failure to disclose the Seed

1 Merchants Endorsement was a violation of WAC 284-30-330. The fact  
2 that Farmland did not disclose the pertinent provision from the  
3 policies that were actually in force is a violation of the regulation.

4 **D. Farmland's Motion to Strike (ECF No. 115)**

5 Finally, the points raised in the Plaintiff's motion for  
6 reconsideration do not constitute improper new facts and legal  
7 theories as Farmland asserts. The alleged improper denial of coverage  
8 was squarely before this Court previously. Plaintiff is clarifying  
9 its position, based in part on testimony from depositions recently  
10 taken in October 2013, which is permissible and preferable where  
11 justice is the goal. Accordingly, the motion to strike is denied.

12 **E. Conclusion**

13 The Court concludes that Farmland's decision to deny coverage-a  
14 failure that Defendant attempts to characterize as a good faith  
15 mistake-constitutes violations of Washington's Insurance Fair Conduct  
16 Act and Washington's Consumer Protection Act. However Farmland  
17 chooses to characterize this conduct, there is no question that  
18 Defendant failed to act reasonably and in good faith in its denial of  
19 coverage. Farmland's conduct in the denial of coverage was not  
20 reasonable as a matter of law and constitutes bad faith.

21 Accordingly,

22 **IT IS ORDERED** that:

23 1. Plaintiff's Motion for Reconsideration, **ECF No. 91**, and  
24 Motion For Partial Summary Judgment, **ECF No. 40**, are **GRANTED** to the  
25 extent discussed above. The remainder of the motion dealing with  
26 estoppel to raise all policy coverage defenses is denied pending

1 further order of the Court and/or trial herein.

2 2. Farmland's Motion to Strike, **ECF No. 115**, is **DENIED**.

3 **IT IS SO ORDERED.**

4 The District Court Executive is directed to enter this Order.

5 **DATED** this 16th day of December, 2013.

6 ***s/Lonny R. Suko***

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LONNY R. SUKO  
SENIOR UNITED STATES DISTRICT JUDGE